

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE DIVISION II

CA 06-495

MALINDA MILLER

March 7, 2007

APPELLANT

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, JUVENILE
DIVISION
[JV-2003-273]

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

HONORABLE MARK HEWITT,
JUDGE

APPELLEE

AFFIRMED

SARAH J. HEFFLEY, Judge

Appellant Malinda Miller appeals from an order entered January 30, 2006, that terminated her parental rights to her twin children, D.M. and J.M., born February 28, 2003. The order also terminated the parental rights of the children's father, who had previously executed a consent to termination of parental rights and is not a party to this appeal. On appeal, Ms. Miller argues that the trial court erred in finding that there was clear and convincing evidence to support a termination of her rights. We affirm.

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Johnson v. Arkansas*

Dep't of Human Servs., 78 Ark. App. 112, 82 S.W.3d 183 (2002). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000).

The Arkansas Department of Human Services (DHS) had been providing protective services to appellant's family since the twins were born on February 28, 2003. On April 23, 2003, DHS took an emergency hold on appellant's children to protect their health and safety. On that day, two Family Service Workers (FSWs) conducted a routine visit to appellant's home and found that the babies were not clean, appeared to be underfed, were

lying on a blanket that had a sharp pin stuck in it, and J.M. had not been given medication as prescribed. The trial court entered an order of emergency custody on April 25, 2003. An adjudication hearing was held on May 27, 2003, and the children were adjudicated dependent-neglected by order entered June 17, 2003. In the order, appellant was ordered to attend and complete parenting classes, undergo drug and alcohol assessment, obtain and maintain stable and appropriate housing and income, obtain a psychological evaluation, visit the children regularly, and submit to random drug screens. On August 5, 2003, a review hearing was held in which appellant was again ordered to maintain appropriate and stable housing and income, attend counseling, and attend Alcoholics Anonymous or Narcotics Anonymous meetings.

The twins are considered medically fragile. They both suffer from asthma, allergies, and gastroesophageal reflux. J.M. has a seizure disorder and a history of aspiration on thin liquids that causes chronic pneumonia. She also has lazy eye and a skin disorder. D.M. has eczema and has been diagnosed with a speech delay. Thus, appellant was also ordered to attend the children's doctor's appointments.

At a review hearing on January 6, 2004, the court noted that appellant had failed to attend all the children's doctor's appointments and "admonish[ed] her that the children cannot be placed with her until she complies with this requirement." At a permanency-planning hearing on July 9, 2004, the court stated that appellant had attended a larger percentage of medical appointments for the children than in the past, but she still missed

several. The court also expressed “grave concerns” over appellant’s ability and desire to understand the severity of her children’s medical conditions. At a review hearing dated January 4, 2005, the court noted that appellant had partially complied with the case plan but had not maintained stable housing, sufficient income, or reliable transportation. Appellant also had attended only one-half of the medical appointments and fifteen out of twenty-four scheduled visitations. Appellant was warned again of the importance of visiting the children regularly, attending their medical appointments, and learning to properly tend to their medical needs.

At a review hearing on June 7, 2005, the goal of the case was changed to termination of parental rights and adoption. On November 8, 2005, a petition for termination of parental rights was filed, citing as grounds for termination Ark. Code Ann. § 9-27-341(b)(3)(B)(Supp. 2005), subsections (i)(a), “the juveniles have been adjudicated dependent-neglected and have continued out of the custody of the parents for more than twelve months despite a meaningful effort by DHS to rehabilitate the parents and correct conditions that caused removal”; and (vii)(a), “other factors or issues have arisen subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juveniles to the custody of the parents is contrary to the juveniles’ health, safety and welfare, and despite the offer of appropriate family services, the parents have manifested the incapacity or indifference to remedy the subsequent factors or issues.” The petition also noted that, in reference to the factors laid out in § 9-27-341(b)(3)(A), the

children were adoptable and continued contact with the mother created potential harm to the health and safety of the children.

The termination hearing was held on January 9, 2006. On January 30, 2006, the court entered an order terminating appellant's parental rights. In its order, the court's findings of fact included the following:

(1) The children have been out of the custody of the parent and in the custody of DHS for a period of time exceeding the past twelve months. They were removed from the custody of their mother when they were less than two months old and have been in foster care for approximately thirty-two of their thirty-four months of life.

(2) The children were adjudicated dependent-neglected on May 27, 2003.

(3) DHS has provided reasonable efforts to rehabilitate the mother and her circumstances that caused the children to be removed as well as to remedy those conditions that arose subsequent to the children coming into foster care. Specifically, those services include referrals for housing, psychological evaluation, counseling, cognitive evaluation, psychiatric evaluation, drug and alcohol assessment, drug screens, parenting classes, several home studies, medical training, visitation, transportation, and foster care. In spite of these services, the mother has been unwilling or unable to rehabilitate herself and her circumstances so that the children could be returned to her within a reasonable period of time as viewed from the children's perspective.

(4) The court finds the witnesses for DHS credible and the mother not credible.

(5) The mother did comply with a number of requirements in the case plan and court orders, such as submitting to drug screens and parenting classes; however, she has not maintained stable housing and has not attended medical appointments regularly. She attended seven of twenty-six appointments in the past year. The mother's demeanor during visits further demonstrates her inability or unwillingness to appreciate the needs of the children. She has not availed herself of opportunities to receive medical training specific to the children and has failed to properly appreciate how medically fragile they are.

(6) Throughout this matter, DHS has made reasonable efforts to reunite the family.

On appeal, appellant presents two arguments relating to the sufficiency of the evidence supporting the termination of her parental rights: (1) the trial court failed to make any specific finding of fact of potential harm to the health and safety of the children, and (2) there was insufficient evidence of parental incapacity or indifference to remedy circumstances. Pursuant to Ark. Code Ann. § 9-27-341, parental rights can be terminated when DHS is attempting to clear a juvenile for permanent placement and evidence is presented that termination is in the juvenile's best interest and one or more statutory ground for termination is present. Subsection (b)(3)(A) provides:

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents.¹

¹ Appellant cites to, and uses the language of, an older version of subsection (3)(A)(ii); this subsection was amended effective August 12, 2005, to replace "caused by continuing contact with the parent..." with "caused by returning the child to the custody of the parent...". The order terminating parental rights was entered on January 30, 2006; therefore the newest version of the statute applies.

For her first argument, appellant asserts that the trial court was required to make a specific finding of fact as to the potential harm to the health and safety of the children by “continued contact with the parent.” Appellant states two bases for this assertion: (1) “nothing was presented as evidence or was noted by the Judge that pointed to a harmful situation that existed at the time the Miller children were taken into DHS care,” and (2) “the only harmful situation that arose was when [appellant] was not able to satisfy Dr. Roe and DHS with her grasp of the points of care for her children.”

As a threshold issue, we note that, to the extent appellant’s argument pertains to a finding made at the adjudication hearing, it is not preserved for our review. Any argument over the findings made at the time the children were taken into DHS custody should have been raised in a timely appeal of the adjudication order. Pursuant to Rule 2(c)(3)(A) of the Arkansas Rules of Appellate Procedure – Civil, the adjudication order was a final, appealable order. The failure of appellant to appeal from the adjudication order deprives this court of jurisdiction to consider the issues raised in that order. *Jefferson v. Arkansas Dep’t of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004).

That said, appellant is incorrect that the trial court was required to make a specific finding of fact as to the potential harm; the plain language of the statute provides that the court must find by clear and convincing evidence that termination is in the child’s best interest, *giving consideration* to the risk of potential harm. *Carroll v. Arkansas Dep’t of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004) (emphasis added). The risk of

potential harm is but a factor for the court to consider in its analysis. *Id.* There is no requirement that every factor considered be established by clear and convincing evidence; rather, after consideration of all factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *McFarland v. Arkansas Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). Regardless, there was ample evidence to support the trial court's finding that the children were in a potentially harmful situation at the time they were taken into DHS custody.

As to her second basis for her first point, that a harmful situation only arose when she was unable to grasp all the points of care for her children, appellant is incorrect that concerns over the children's safety were based solely on her lack of memorization abilities. It is true that appellant was expected to remember the children's medical conditions, their medications, the amount of medication to administer, and how many times they are given during the day. Dr. Diana Roe, the children's pediatrician, testified that appellant had not been able to remember that information, and the most significant danger to these children if placed with their mother would be not getting their medication. Dr. Roe testified that J.M. needs her medication to avoid having seizures, and should J.M. have a seizure, immediate action would be necessary to avoid death or brain injury. Both children require several medications a day to keep their asthma under control. Dr. Roe also testified that both children are allergic to certain drugs, and if the children happened to require emergency care and appellant could not remember what drugs they were allergic to, they

could accidentally get that drug and go into shock. Dr. Roe testified that she would be concerned for the children's safety should appellant be their primary caregiver, because appellant does not seem to understand how to meet the children's special medical needs.

Appellant also argues that had a list been provided to her to aid her memory, she would have been more successful in remembering her children's medical information. Appellant argues that "no one attempted to aid [appellant] in outlining and keeping a written copy of what she needed to remember." At the termination hearing, however, Dr. Roe testified that she gave appellant several lists of the children's allergies and medications. More importantly, several letters from Dr. Roe to appellant were admitted into evidence at the termination hearing, which included information sheets for both children listing their drug allergies, medical problems, treating specialists, and current medications. Each of these letters was signed by appellant, confirming her receipt of the information. Therefore, appellant's argument that she received no list to "aid in her memory" is baseless and of no merit.

For her second argument on appeal, appellant argues that there was no evidence presented at the termination hearing that supported a finding that she was indifferent to remedying the situation that caused her children to be removed. In effect, appellant is arguing that the testimony presented shows she was in partial compliance with the case plan and orders from the court, which demonstrates she was not indifferent to remedying the circumstances that caused her children to be removed.

There is no question that appellant did achieve partial compliance; in its order, the trial court found that “the mother did comply with a number of requirements in the case plan and court orders.” However, our case law has established that a parent’s rights may be terminated even though they are in partial compliance with the case plan. *Chase v. Ark. Dep’t of Human Servs.*, 86 Ark.App. 237, 184 S.W.3d 453 (2004). In fact, this court has held that even full completion of a case plan is not determinative of defeating a petition to terminate parental rights. *Wright v. Ark. Dep’t of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). What matters is whether completion of the case plan achieved the intended result of making the parent capable of caring for the child. *Id.*

The trial court found that appellant had not attended medical appointments regularly, which was “the primary issue in this case.” Robbie McKay, the caseworker assigned to this case, testified that she notified appellant of the doctor’s appointments as ordered by the court, that she had appellant sign the notifications as verification, and that appellant had subsequently missed most of these appointments. Dr. Roe testified that she had scheduled two-hour workshops to personally work with appellant and train her as to the proper medical care for her children, but appellant came to only three workshops, missed two workshops, and was ultimately given a letter telling her to contact Dr. Roe and reschedule further workshops, which appellant never did. Based on the evidence presented at the hearing, the trial court’s finding that appellant was unable or unwilling to rehabilitate

herself or appreciate the medical needs of her children was not clearly erroneous.

Therefore, we affirm its decision.

Affirmed.

VAUGHT and MILLER, JJ., agree.